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) No. CIV 97-2095-PHX-ROS

ORDER

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1 Accordingly, the ALJ concluded, Leo was not under a “disability” as defined by the Social Security Act, 42
2 U.S.C. § 401 et seq. (ALJ Findings at ¶ 8, R. at 24).

3 Leo argues that, in arriving at this decision, the ALJ erred by improperly rejecting Leo’s complaints
4 of pain and improperly determining her residual functional capacity. The Commissioner responds that these
5 arguments are without merit.

6 **I. Standard of Review**

7 A federal court may set aside a denial of disability benefits only if the findings of fact are not supported
8 by substantial evidence or if the denial was based on legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th
9 Cir. 1996); Flaten v. Secretary of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995).
10 “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support
11 a conclusion,” considering the record as a whole. Smolen, 80 F.3d at 1279 (quoting Richardson v. Perales,
12 402 U.S. 389, 401 (1971)). To determine whether substantial evidence supports the ALJ’s decision, the
13 Court must review the administrative record as a whole, considering both the evidence that supports and the
14 evidence that detracts from the ALJ’s conclusion. Id.; Orteza v. Shalala, 50 F.3d 748, 749 (9th Cir. 1995);
15 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

16 **II. Subjective Complaints of Pain**

17 As summarized by the ALJ, Leo “alleged an inability to work because of disabling back pain which
18 radiates down the right buttocks [sic] into the right leg, left ankle pain, pain in the right elbow, thrombophlebitis
19 of both lower extremities, arthritis of the right knee, headaches, asthma, high blood pressure, and
20 incontinence.” (ALJ Decision (“Dec.”), R. at 18). “Pain of sufficient severity caused by a medically diagnosed
21 ‘anatomical, physiological, or psychological abnormalit[y]’ may provide the basis for determining that a
22 claimant is disabled.” Light v. Social Security Admin., 119 F.3d 789, 792 (9th Cir. 1997) (quoting 42 U.S.C.
23 S 423(d)(5)(A)). However, the ALJ discredited Leo’s complaints of pain.

24 A two-part approach is employed to establish whether a claimant is disabled based on subjective
25 complaints of pain. First, Leo was required to show that “medical signs or laboratory findings show that a
26 medically determinable impairment(s) is present.” Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995)
27 (citing 20 C.F.R. § 404.1529(b)); see also Smolen, 80 F.3d at 1281-82. However, Leo was not required
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1 to present medical evidence to establish the severity of her pain. Light, 119 F.3d at 792; Smolen, 80 F.3d
2 at 1282. The ALJ admits that Leo made the showing required at the first stage.

3 A credibility determination is the second of the two-part approach. Because the ALJ rejected Leo's
4 subjective complaints of pain, the ALJ was required to set forth the symptom testimony by Leo that lacks
5 credibility and the facts in the record leading to the conclusion that credibility is lacking.¹ Smolen, 80 F.3d at
6 1284. The findings made in rejecting the pain complaints must be specific to provide the court enough
7 information to determine that the ALJ did not reject the claim arbitrarily, but based his decision on permissible
8 factors. Orteza, 50 F.3d at 750; Bunnell v. Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc).
9 Specifically, the ALJ's decision to reject Leo's subjective complaints of pain must be based upon clear and
10 convincing reasons supported by substantial evidence in the record. Lester v. Chater, 81 F.3d 821, 834 (9th
11 Cir. 1995); Smolen, 80 F.3d at 1283-84; see also Johnson 60 F.3d at 1433.

12 Before reaching the issue of whether Leo's pain constituted a disability, the ALJ reviewed several of
13 Leo's alleged physical impairments and concluded that none were, in themselves, disabling. Upon reaching
14 this conclusion, the ALJ further concluded that "the claimant is capable of performing a full range of sedentary
15 work activities." (ALJ Dec., R. at 21). Thus, the ALJ reached this conclusion before he even considered
16 Plaintiff's subjective complaints of pain.

17 After reaching this initial conclusion, the ALJ proceeded to consider Leo's subjective complaints of
18 pain but found no reason to alter his decision. In evaluating the complaints of pain, the ALJ did not engage
19 in the first step of expressly determining which of the alleged impairments he considered "medically
20 determinable," see Johnson, 60 F.3d at 1433, and which, if any, he did not, because the ALJ did not dispute
21 that this step was satisfied. The Commissioner's Cross-Motion for Summary Judgment states that "there was
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23 ¹ Leo argues that the ALJ should not have considered the issue of her credibility because sufficient
24 medical evidence supported her complaints of pain. She quotes Social Security Ruling ("SSR") 96-7p at 24-
25 25, providing that an ALJ should make credibility determinations about complaints of pain only when
26 "statements about the intensity, persistence, or functionally limiting effects of pain . . . are not substantiated by
27 objective medical evidence." Although Plaintiff's medical records establish the existence of certain physical
28 impairments that cause pain, they do not, alone, establish the severity of the pain she suffers. Nor were they
required to — a claimant is not required to establish the severity of pain through medical evidence. Light, 119
F.3d at 792. Rather, a credibility determination is required because "'pain is subjective and not susceptible
to measurement by reliable techniques.'" Bunnell v. Sullivan, 947 F.2d at 346 (citing SSR 88-13).

1 no question that the medical evidence established an underlying medical impairment which could be reasonably
2 expected to produce the pain alleged.” (Mem. in Support of Cross-Motion at 3). Moreover, the ALJ’s
3 finding regarding step three of the five-step sequential process states: “The medical evidence established that
4 the claimant has severe chronic low back pain, and osteoarthritis of the knee.” (ALJ Dec., R. at 23). Thus,
5 the ALJ considered at least these two physical impairments to be “medically determinable,” see Johnson, 60
6 F.3d at 1433.

7 Instead of expressly addressing this first step, the ALJ proceeded directly to the second step —
8 determining the credibility of Plaintiff’s testimony about her pain. (See Mem. in Support of Cross-Motion at
9 3). In making this credibility determination, the ALJ was entitled to consider Leo’s reputation for truthfulness,
10 any inconsistencies either in her testimony or between her testimony and her conduct, any inadequately-
11 explained failure to seek treatment, her daily activities, her work record, and evidence from physicians and
12 third parties concerning the nature, severity, and effect of her symptoms. Light, 119 F.3d at 792 (citing
13 Smolen, 80 F.3d at 1284). However, because Leo was not required to present medical evidence to establish
14 the severity of her pain, a finding that Leo lacks credibility cannot be premised solely on lack of medical
15 evidence, i.e., medical evidence alone cannot constitute the “substantial evidence” necessary to support the
16 ALJ’s decision.. Id. (citing Lester, 81 F.3d at 834).

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19 20 **A. Credibility Assessment Based on Nonmedical Evidence**

21 **1. Consistency of Information Leo Provided About Onset and** 22 **Cause of Back Pain**

23 The ALJ began his inquiry into credibility by noting that, though Leo testified that she injured her back
24 as the result of a fall in 1992, a review of two sets of medical records, those covering the period immediately
25 after the fall and those of Dr. Brainard nine months later, indicated that Leo never mentioned back pain when
26 describing the injuries she sustained in the fall. The ALJ added that Leo did not mention suffering from back
27 pain until February, 1994 and again in October, 1994 during her appointment with Dr. Humphrey. During
28 the latter appointment, Leo, for the first time, attributed the back pain to her accident.

1 Review of the records from Leo's emergency room visit in February 1992 and from her appointment
2 with Dr. Brainard in November 1992 confirm that she did not complain of back pain on either occasion. (See
3 R. at 132-137 (E.R. Rep.) and 138-140 (Dr. Brainard Rep.)). The record also confirms, as the ALJ noted,
4 that Leo did not mention back pain until February, 1994. However, this statement is somewhat misleading
5 because Leo was not examined again until February 1994.²

6 The record of the February, 1994 evaluation confirms that Leo then complained of back pain. (Gen.
7 Med. Eval., R. at 141). The doctor's assessment indicated that Leo has a "lumbar disorder." (Id. at 142).
8 A report of a subsequent evaluation in July, 1994, noted that Leo "presently has localized pain [right] gluteal
9 area down [right] leg to heel." (Id. at 143). In a symptom questionnaire submitted to DES in August, 1994,
10 Plaintiff stated she suffers from "pain[,] right low back to toes." (R. at 148). The record of another medical
11 evaluation for DES in September, 1994 contains a physician's note that Leo has a "back problem." (R. at
12 151).

13 As the ALJ indicated, Dr. Humphrey examined Leo in October, 1994. (R. at 154). The record of
14 Humphrey's evaluation includes the following remark:

15 [Leo] indicates that in February of 1992 that following a fall she injured both her low back
16 and her left ankle. . . . Since that fall she has been in constant pain in her low back, radiating
17 primarily to the right buttocks and down the posterior thigh, lateral calf, out to the foot and
18 toes.

19 (R. at 154). In the summary of his impressions, Dr. Humphrey noted that Leo has "chronic low back, right
20 lower extremity pain which may be related to an L-5 and or S-1 radiculopathy with sensory deficits only, no
21 alteration of reflexes or motor involvement."

22 After comparing Dr. Humphrey's report to the two reports prepared in 1992, the ALJ concluded:
23 "This contradictory evidence implies the claimant added symptoms and increased their severity associated with
24 her relatively minor trip-and-fall event as she sought to obtain financial support from public agencies." (ALJ
25 Dec., R. at 22). This conclusion would have been more helpful had the ALJ clarified what information he
26 considered to be contradictory. Leo's medical records are not contradictory about whether she suffered from

27 ² Leo had an evaluation required by the Arizona Department of Economic Security ("DES") in order
28 to receive disability assistance. (See R. at 150).

1 back pain; rather, they indicate that she began suffering from back pain at some point after her examination
2 in the fall of 1992. However, Leo's records are inconsistent about when the back pain began.

3 Other than Leo's statements two or more years after the fall, no evidence supports a conclusion that
4 Leo experienced back pain immediately after the fall. She did not report such pain during her emergency room
5 visit or even during her fall, 1992 examination several months later. Moreover, when Leo first began reporting
6 back pain in 1994, she did not indicate when it began; only later did she state that the pain began shortly after
7 the accident. (See R. at 181). In a report in August, 1994, Leo stated that she injured her back during the
8 accident and added, "My life ended that day [of the accident] to this because of incapacitating back pain. (R.
9 at 73). When Dr. Upchurch evaluated Leo in September, 1995, Leo stated for the first time that she "twisted
10 [her] back" during the accident and added, "Now from accident [sic] have pain right side from small of back
11 to toes." (R. at 181). This evidence is inconsistent with the initial reports, two in the ten months following the
12 accident, containing no indication that Leo was suffering from back pain. The Court will not speculate about
13 the reasons Leo submitted inconsistent evidence, but the ALJ's conclusion that Leo did so is supported by
14 the record. Submission of inconsistent evidence negatively impacts Leo's credibility.

15 **2. Consistency Between Treatment Sought and Complaints of Pain**

16 After finding that Leo had submitted inconsistent information about the date her back pain began, the
17 ALJ considered whether the treatment Leo sought was consistent with her claims of pain. The ALJ noted that
18 claimant received no treatment in 1993, and added: "[C]laimant alleged she was denied the support of
19 Arizona's indigent medical program, and she could not afford medical care." (ALJ Dec., R. at 22). However,
20 the ALJ proceeded:

21 [T]he lack of medical records implies that the claimant was able to do without medical care
22 for 12 months and had no crises which would have caused her to seek attention at an
emergency room. This alone suggests the degree of discomfort alleged has been exaggerated.

23 (ALJ Dec., R. at 22). The fact that Leo "was able to do without" medical care for 12 months, (id.),
24 establishes only that she did not obtain medical care, not that she did not need medical care. The ALJ does
25 not conclude, nor does the record indicate, that Leo's assertions of indigence were untrue.³ The Ninth Circuit

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27 ³ In the Vocational Report submitted to the SSA in August 1994, Leo described her financial status
28 in the course of describing the effect of her fall in 1992. She stated: "My life ended that day [of the fall]
because of incapacitating back pain with no way to get treatment (no money, no job, no insurance, no doctor.)"

1 has indicated that inability to afford treatment is a “good reason” for not obtaining it. Smolen, 80 F.3d at
2 1284. Thus, the ALJ’s conclusion, that Leo’s failure to obtain treatment in 1993 constitutes evidence that she
3 was exaggerating her pain, is not supported by the evidence.

4 **3. Consistency Between Activity Level and Complaints of Pain**

5 Next, the ALJ considered evidence of Leo’s activity level. The ALJ noted that, in August 1994, Leo
6 claimed that she had not been driving since her accident over two years earlier because prolonged sitting was
7 painful. (ALJ Dec., R. at 22). Two forms filled out by Leo confirm that she made this statement. (See
8 Disability Report, July 1994, R. at 77; Activities Questionnaire (“AQ”), Aug. 1994, R. at 146). However,
9 by January 1995, she stated that she could drive and had taken two trips to the store in a six month period.
10 (ALJ Decision, R. at 22). In the same report, she also stated that she shops once a week for a total trip time
11 of about three hours. (Id.) Review of a form Leo filled out in January, 1995 confirms these remarks. (See
12 AQ, Jan. 1995, R. at 165-66). In addition, the ALJ noted, Leo requested a hearing in Phoenix rather than
13 Prescott even though she could have avoided a trip involving prolonged sitting had the hearing been held in
14 the latter. (Id.) Based on this evidence of Leo’s activities, the ALJ concluded, “It appears the claimant is
15 capable of moving about and sitting for a length of time not incompatible with sedentary work activities.” (ALJ
16 Dec., R. at 22).

17 The ALJ’s recitation of Leo’s activity summaries is accurate and the evidence supports his statement
18 that Plaintiff’s activity level is “not incompatible” with “sedentary work activities.” (Id.) However, the ALJ
19 proceeded to rely on this determination in finding that Leo was not credible. (See R. at 23). The ALJ’s
20 ultimate finding of lack of credibility is not consistent with the evidence of Leo’s activity level. Leo did not
21 assert that she was unable to perform any sedentary work, however brief; she merely asserted that she was
22 unable to do the type of work she had done in the past, largely full-time office work including a position as a
23 medical transcriptionist. (See Hrg. Trans. at 33-39 (explaining past work experience), 49 (explaining why she
24 can not do work of the type she has performed in the past). Evidence that Leo shopped for a total of three
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26 (R. at 73). In an application for supplemental security income in June, 1994, Plaintiff explained that she lives
27 with a friend. Her assets consisted of a 1979 Chevette she estimated to be worth \$100, plus \$10 in a
28 checking account. At the hearing before the ALJ in January, 1996, Leo stated that she obtains \$173 per
months from DES, and food stamps valued at approximately \$100. (Hrg. Trans. at 40).

1 hours once per week and drove on occasion establishes some activity level, but is not inconsistent with Leo's
2 claimed inability to perform her prior work.

3 The Court did not discover any other evidence of activity level that would justify the ALJ's conclusion
4 that Plaintiff lacked credibility. The Disability Report Leo filed with the SSA in July, 1994 contains the
5 following question: "Explain how your position now keeps you from working." (R. at 74).
6 Leo wrote:

7 Cannot even care for self for [sic] normal daily activities of cooking, cleaning. Cannot stand
8 for any length of time — cannot sit for prolonged time in same position, cannot walk without
9 assistance for more than few feet. . . . Severe back pain constantly — frequently cannot eat
10 or sleep.

11 (Id.) Subsequent reports contain comparable information. (See Evaluation of Dr. Brainard, Nov. 1992
12 (stating that Leo said she "was unable to stand or walk more than two hours at a time during the day without
13 having to lie down and rest," and that she has a "two-hour maximum daily activity schedule"), R. at 129-30;
14 AQ, Aug. 1994 (stating that, on a typical day, Leo feeds her cats, cleans their litter boxes, and generally tries
15 to do one household chore before the pain requires her to spend the rest of the day in bed or in a recliner),
16 R. at 144).

17 At the hearing before the ALJ in January 1996, Leo testified that, in the fall of 1992 and the spring
18 of 1993, she worked at two temporary positions acquired through an employment agency that located
19 positions for temporary workers. (Hrg. Trans. at 44). Each time, she worked at the same office job stuffing
20 envelopes and performing other miscellaneous tasks. (Id.) At the hearing, Leo stated that, on each occasion,
21 she had to quit the job in less than two weeks because the low back pain radiating down to her knee got
22 worse as the day progressed. (Id. at 44-45). In a prior report, Leo stated that she could not stand as often
23 as she needed to do the photocopying required in the two positions, and she could not concentrate due to
24 pain. (Reconsid. Disab. Rep., R. at 65). In this report, she also stated that she had completed the first of the
25 assignments, a temporary position slightly over three weeks in length, but not the second.
26 (Id. at 64, 67).

27 These reports of Leo's activity level, like the evidence the ALJ referenced, are consistent with the
28 ALJ's statement that Leo's activity level was "not incompatible" with that required for "sedentary work
activities." However, like the evidence relied upon by the ALJ, the additional record evidence does not

1 support the ALJ's finding that Leo lacked credibility. Rather, the evidence indicates that Leo consistently
2 represents that she is able to engage in limited activity for no more than two to three hours at a time, a level
3 far less than required for her past full-time sedentary positions.

4 **4. Consistency Between Medications Used and Complaints of Pain**

5 After considering Leo's activity level, the ALJ next considered whether Leo's medications would
6 interfere with her ability to work and concluded that nothing in the record indicated that they would. This
7 conclusion is consistent with the record. The ALJ also noted that, in attempting to relieve her pain, "[Leo]
8 used only nonsteroidal anti-inflammatories, which she currently purchases over the counter." (ALJ Decision
9 at 22). Lack of prescription pain medicine is a valid consideration. Orteza, 50 F.3d at 750 (9th Cir. 1995).
10 However, the ALJ's statement is misleading. The record does not support the conclusion that Leo was taking
11 only low-dose anti-inflammatories purchased over the counter, and no other medication. At the hearing, Leo
12 stated that, in addition to ibuprofen obtained over the counter, she still took the higher dosage ibuprofen she
13 had been prescribed on numerous occasions. (Hrg. Trans. at 19-20). Leo also indicated, in one of the forms
14 contained in the record, that she had been given Percodan or Vicodan for pain. (Symptom Questionnaire,
15 R. at 149). The evidence indicates that Leo had taken and continued to take prescription pain
16 medication.

17 **5. Consistency Between Information Leo Provided About Weight** 18 **and Ability to Eat**

19 The ALJ concluded that Leo's reports of being unable to eat were inconsistent with the weight records
20 indicating that she weighed over 200 pounds in 1994 and reported weighing 190 at the hearing. (ALJ Dec.
21 at 23). He also stated that Dr. Humphrey's report indicated Plaintiff had no muscle atrophy, a condition that,
22 according to the ALJ, is associated with chronic inability to eat. (Id.)

23 The ALJ accurately stated that records indicated Leo weighed more than 200 pounds. In various
24 doctor's reports, Leo's weight is recorded in a range from 207 to 216 pounds. (See R. at 141, 151, 181).
25 However, the evidence does not support the conclusion that Leo's weight and muscle tone are inconsistent
26 with her claims of inability to eat. In describing the restrictions on her activity, Leo stated, in a questionnaire
27 completed in August 1994, "often times pain so severe can't eat anyway." (AQ, R. at 145). However, Leo
28 did not state that she never eats, only that she often was unable to do so. Moreover, at the hearing, the ALJ

1 expressly stated that it looked like Leo weighed less than the 207 pounds reported in one of the medical
2 records, whereupon Leo reported that she had lost weight and was down to 190 pounds. (Hrg. Trans. at 32).
3 A weight loss of 17 pounds, perhaps more, in a two-year period is consistent with Leo's reports of difficulty
4 in eating. In addition, the ALJ cites no evidentiary basis, such as expert witness testimony, for his assertion
5 that muscle atrophy is associated with chronic inability to eat. The ALJ's determination about inconsistency
6 between Leo's weight and muscle tone and her claimed inability to eat is not justified by the
7 record.

8 **6. Conclusion**

9 The nonmedical evidence of record supports only one of the reasons the ALJ provided for concluding
10 that Leo's subjective complaints of pain were not credible — the inconsistent evidence about when her back
11 pain began. The record does not substantiate any of the four other reasons the ALJ provides for rejecting
12 Leo's credibility — lack of treatment, activity level inconsistent with pain complaints, lack of prescription pain
13 medication, and unsupported inability to eat. The sole inconsistency that the ALJ identified is not, alone,
14 substantial evidence that Plaintiff lacks credibility.

15 Defendant does not indicate that the ALJ relied on any other evidence regarding credibility. (See
16 Mem. in Support of Cross-Motion at 2-4). However, the Court's review of the record indicates that, in the
17 section of the decision in which the ALJ determined that the physical impairments alone did not constitute a
18 disability, the ALJ also engaged in limited analysis of whether the medical evidence was consistent with Leo's
19 statements about the severity of her pain. (See ALJ Dec., R. at 18-21; see also id. at 24 (stating that Plaintiff's
20 pain symptoms are not supported by the medical evidence, to the extent that the symptoms are inconsistent
21 with the conclusion that she can do sedentary work)).

22 As stated above, an ALJ assessing credibility of pain complaints can consider evidence from
23 physicians and third parties concerning the nature, severity, and effect of the claimant's symptoms. Light, 119
24 F.3d at 792 (citing Smolen, 80 F.3d at 1284). However, because claimants are not required to present
25 medical evidence about the severity of their pain, the credibility determination cannot be based solely on lack
26 of such evidence. Id. (citing Lester, 81 F.3d at 834). Therefore, the Court proceeds to consider whether the
27 medical evidence upon which the ALJ relies, in conjunction with the evidence of an inconsistency in the record
28 regarding the onset of Leo's back pain, constitutes substantial evidence of lack of credibility.

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3 **B. Credibility Assessment Based on Medical Evidence**

4 Because the ALJ's review of the medical evidence involved consideration of two different issues —
5 whether the impairments constituted a disability and whether the medical evidence of impairments was
6 consistent with Plaintiff's pain allegations — his analysis of these two issues is intertwined. Thus, it is difficult
7 to determine when the ALJ's discussion of medical evidence pertained to the issue of whether the evidence
8 was consistent with the pain allegations. Much of the evidence recounted by the ALJ appears to focus on the
9 Plaintiff's physical abilities apart from the issue of pain. For example, the following excerpt includes everything
10 the ALJ stated about Dr. Humphrey's report, one on which the ALJ relied extensively. With respect to Leo's
11 right knee impairment:

12 Dr. Humphrey reported the claimant's gait was normal, she was able to rise on heels
13 and toes, [and] walk in tandem without difficulty. She was able to perform some squatting
14 unaided. He noted normal range of motion to both knees. The right knee was specifically
found to have no medial, lateral, anterior, or posterior instability. No effusion or deformity
was noticed. His conclusion was the right knee appeared to be stable. . . .

15 (Hrg. Trans. at 18). With respect to Leo's lower back impairment:

16 Dr. Humphrey reported the claimant was able to get on and off an examining table,
17 up and out of a standard chair, to dress and undress without assistance. He reported the
18 claimant "was able to bend forward at the waist so that the outstretched arms could reach
beyond the ankles." He reported no list or spasm in her back muscles, her reflexes were
19 found to be intact, and single leg raises were reported to extend to 80 degrees. He found only
decreased sensation in pinprick along the lateral border of her right foot and right distal calf
to indicate any radiculopathy. Based on his examination, he reported there would be no
20 reason to severely restrict the claimant's activities because of her complaints of back pain and
sensory loss in the right lower extremity. . . .

21 Dr. Humphrey could have recommended additional radiological diagnostic testing but
22 did not, and there was nothing in his narrative which would have indicated it was warranted.

23 (Id. at 19 (emphasis added)). With respect to Leo's right elbow impairment:

24 In Dr. Humphrey's physical examination, he reported her upper extremities were
neurologically intact, as well as motor involvement. Range of motion to the elbows was also
25 reported to be normal. In her history, it is not evidenced she reported right elbow pain to Dr.
Humphrey as one of her problems.

26 (Id. at 19 (emphasis added)). With respect to Leo's left ankle impairment:

27 Dr. Humphrey found the Plaintiff's reflexes to be neurologically intact, with only
28 sensory loss in her right foot which he related to a possible radiculopathy of the lumbar spine.

1 He noted normal range of motion in both ankles, found her gait to be normal, and [found her]
2 to be able to rise on her heels and toes, and walk in tandem without difficulty.

3 (Id. at 20). Only the underlined portions deal with the issue of subjective pain complaints.⁴

4 Absent a doctor's express assessment of whether the medical evidence accords with the pain
5 complaints, medical evidence on issues such as "range of motion" and "intact reflexes" provides little guidance
6 on the issue of the severity of pain. Therefore, the Court concludes that the ALJ summarized such information
7 to address the first issue, whether the medical evidence established disability absent allegations of pain. The
8 Court proceeds to review the medical evidence referenced by the ALJ to the extent that it reflects the doctors'
9 assessments of the legitimacy of Leo's complaints of pain.

10 The ALJ's summary of Dr. Humphrey's conclusions about Leo's pain allegations is underlined above.
11 As Plaintiff indicates, the ALJ excerpted only a portion of Dr. Humphrey's statement. In full, Dr. Humphrey's
12 report stated:

13 At this time based on current evaluation[,] there would be no reason to severely
14 restrict this person's activities because of her complaints of back pain and sensory loss
involving the right lower extremity, it would be wise to avoid prolonged sitting, standing, and
ambulation, and any significant bending or lifting.

15 (Humphrey Rep., R. at 156 (emphasis added)). The ALJ relied on the underlined portion of this statement,
16 ignoring the rest. The manner in which this statement is punctuated makes it unclear whether the phrase
17 "because of her complaints of back pain and sensory loss involving the right lower extremity" is meant to
18 accompany the clause before it, after it, or both. Regardless of that, however, it is clear that the doctor's
19 conclusion, that no severe restriction on activity is necessary, is further illuminated by the additional admonition
20 that Leo should "avoid prolonged sitting, standing, and ambulation."

21 Absent the additional portion of Humphrey's conclusion quoted above, his statement that Leo has "no
22 severe restriction" could be given the meaning assigned by the ALJ — that Leo can perform sedentary work.
23 However, when the additional statement is included, it is difficult to conclude that Dr. Humphrey considered
24 Plaintiff capable of sedentary work — such work entails precisely the "prolonged sitting" he instructed her to
25 avoid. The ALJ also failed to note that Humphrey appeared to find Plaintiff's allegations of pain credible.

27 ⁴ One of these merely indicates that Plaintiff did not report pain she now purports to have. The
28 other merely relays a conclusion the doctor expressly reached.

1 Humphrey expressly concluded that Leo has “chronic low back, right lower extremity pain which may be
2 related to an L-5 and or S-1 radiculopathy with sensory deficits only” (R. at 155). Therefore,
3 considered in context, Dr. Humphrey’s statement, on which the ALJ relied, does not provide substantial
4 evidence that Leo can perform sedentary work despite her pain complaints. Statements taken out of context
5 do not constitute substantial evidence because, as stated previously, a determination of whether evidence is
6 substantial requires review of the record as a whole, including both evidence supporting and evidence
7 detracting from the ALJ’s decision. See Smolen, 80 F.3d at 1279; Orteza, 50 F.3d at 749.

8 In his review of the medical evidence, the next reference the ALJ made to Leo’s pain complaints is
9 the following conclusion: “After reviewing the brief medical examination reports provided for the claimant’s
10 general assistance grant from the State agency, the undersigned concludes no doctor found her permanently
11 incapacitated because of her complaints of low back pain.” (Hrg. Trans., R. at 19). The ALJ noted that Dr.
12 Haberen “felt she could work in 3 months” of his examination. (Id.) However, Dr. Haberen made this
13 estimate only after concluding that, as of the date of his examination in February, 1994, Leo was unable to
14 perform “any substantial gainful employment for which [she] was qualified.” (R. at 142). Proceeding with his
15 summary, the ALJ correctly noted that Dr. Virriculi did not find Plaintiff unable to perform substantial gainful
16 employment when he examined her in September, 1994. (R. at 152). However, Dr. Virriculi provided no
17 explanation of whether his conclusion was based on Plaintiff’s physical impairments alone or her subjective
18 complaints of pain.

19 Continuing with his analysis of the evidence regarding disabling back pain, the ALJ stated, “Dr.
20 Upchurch focused on the claimant’s degenerative joint disease of her knees and recommended reevaluation
21 in 6 months.” (ALJ Dec., R at 19). Including Dr. Upchurch’s report as support for the conclusion that “no
22 doctor found [Leo] permanently incapacitated because of her complaints of low back pain” is misleading. Dr.
23 Upchurch’s summary of Plaintiff’s complaints discusses her back pain at length: “Now from accident [sic] have
24 pain right side from small of back to toes[. E]xcruciating most of day[.]” (R. at 181). In his assessment
25 section, Dr. Upchurch focused on Leo’s knee impairment, concluding that she suffers from a “degenerative
26 joint disease [in] both knees.” (R. at 182). However, Upchurch did not discount Leo’s complaints of back
27 pain or indicate that the two impairments were unrelated. Moreover, whatever the basis, Dr. Upchurch found
28 Leo incapable of performing substantial gainful employment. The recommendation that she be reevaluated

1 in 6 months followed his conclusion of inability to even estimate the time by which Leo could return to work.
2 Only by separating the discussion of Leo's back from the discussion of knee impairments was the ALJ able
3 to utilize Upchurch's report as support for the position that Plaintiff did not have disabling pain.

4 When the ALJ considered Plaintiff's knee ailments, he never mentioned that Upchurch found Leo
5 incapable of substantial gainful employment based on the assessment of degenerative joint disease. (See R.
6 at 18). Rather, he paraphrased two different statements from the report, one stating that Leo's degenerative
7 joint disease had "only 'moderate' effect on function" and that Upchurch "recommended that [Leo] use
8 medication to reduce the inflammation, possibly allowing her to return to work." (Id.). Again, by failing to
9 set forth the remarks in context, the ALJ is able to emphasize portions of the record that often take on a
10 different meaning when the record is considered as a whole. Statements isolated and quoted out of context
11 do not constitute substantial evidence. See Smolen, 80 F.3d at 1279; Orteza, 50 F.3d at 749.

12 The ALJ made the same error while discussing Dr. Brainard's 1992 report. Regarding Leo's right
13 knee impairment, the ALJ stated, "Dr. Brainard reported in November 1992 that the claimant had subjective
14 instability of the right knee, but he found the right knee to be clinically stable upon examination." (ALJ Dec.,
15 R. at 18 (emphasis in ALJ decision). Brainard made these statements, but, immediately after stating that the
16 right knee was stable, he added: "There is a feeling of instability on flexion, external rotation and subsequent
17 extension of the knee and there is marked subpatellar crepitation which is painful. There is pain on quad
18 setting against a suprapatellar resist[ance] on the right." (R. at 139 (emphasis added)). Perhaps the ALJ
19 meant to consider this information only to determine whether disability existed based solely on physical
20 impairments, aside from the pain. However, if the ALJ meant to use this evidence to show lack of pain, the
21 context once again changes the meaning of the ALJ's remarks.

22 Because the ALJ relied upon several portions of the record that have a different meaning when
23 considered in context, his finding, that the medical evidence is not consistent with Leo's allegations of pain,
24 is not supported by substantial evidence.

25 **IV. Conclusion**

26 The ALJ found Leo's pain complaints unreliable for reasons that are neither clear and convincing nor
27 supported by substantial evidence. Therefore, the Commissioner's Motion for Summary Judgment will be
28 denied. Plaintiff requests that the action be vacated and remanded for further proceedings. The Court has

1 the discretion to remand the action for additional evidence and findings or to award benefits. Erickson, 9 F.3d
2 at 819; Barbato v. Commissioner of SSA, 923 F. Supp. 1273, 1277 (C.D. Cal. 1996). Plaintiff's request
3 for vacation and remand is granted. In assessing the Plaintiff's claim on remand, the ALJ should separate his
4 discussion of whether the physical ailments, alone, are disabling from the discussion of whether medical
5 evidence accords with Plaintiff's allegations of pain. In the latter discussion, he should not consider the effect
6 of each impairment in isolation. Moreover, throughout his analysis, the ALJ should rely on evidence of record
7 that does not change in meaning when removed from its context, or provide enough information about the
8 context to render the meaning accurate. In reaching this decision, the Court cautions that nothing in this Order
9 is meant to suggest the appropriate outcome on remand and the Order should not be construed otherwise.

10 Accordingly,

11 **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment is granted. (Dkt. # 17).

12 **IT IS FURTHER ORDERED** that Defendants' Cross-Motion for Summary Judgment is denied.
13 (Dkt. # 24).

14 **IT IS FURTHER ORDERED** that the decision of the ALJ is reversed and this case is remanded
15 to the Social Security Administration for further proceedings consistent with this Order.

16 DATED this ____ day of January, 2000.

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19 _____
20 ROSLYN O. SILVER
21 UNITED STATES DISTRICT JUDGE

22 copies to all counsel of record
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